In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 1135.

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FRANCIS J. KAUFMAN,
Petitioner,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY,
now known as
PENN CENTRAL COMPANY,
Respondent.

BRIEF OPPOSING WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

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STATUTES INVOLVED.

The statutes relied on by petitioner, Sections 51, 55, and 56 of the F.E.L.A., are neither in dispute nor involved.

QUESTIONS PRESENTED.

Petitioner's statement (A), the directed verdict was "on the sole ground that Ohio and not federal law applies," and his assertion the Courts of Ohio refused to apply the existing federal law, is not true. Conclusions of Law Nos. 2, 3, petitioner's brief, pages 13, 14, expressly stating federal law applies and citing *Callen v. Pennsylvania Railroad Company*, 332 U.S. 625; *Dice v. Akron, Canton & Youngstown Railroad Company*, 342 U.S. 359.

Petitioner's (B) is also inaccurate; as to the release, he was the only witness to testify and expressly waived

fraud. His claim of a "recurrence of his previous condition" refutes Mutual Mistake in terms; and "previous condition," by his own admissions, could well refer to his condition before as well as after the tank car explosion on which he bases his F.E.L.A. claim.

A more accurate presentation of Questions Presented would be:

> (A) Should a jury be permitted to speculate on the validity of a release where fraud is expressly waived, where the injury claimed is identical both before and after signing a release and petitioner's sole claim of Mutual Mistake is "plaintiff suffered a recurrence of his previous condition"?
>
> (B) Under the applicable federal law, is there any fact issue for a jury where petitioner's evidence establishes:
>
> (1) Identical injury and black-outs from drinking both before and after a tank car explosion in June, 1961.
>
> (2) Identical injury claimed both before and after a release is signed in September, 1961, except plaintiff admits he was much improved afterwards and has had no medical treatment whatever since 1963.
>
> (3) No railroad negligence re tank car explosion.
>
> (4) Fraud in connection with the release expressly waived by plaintiff, who admits claiming previous railroad injuries and signing similar railroad releases.
>
> (5) No medical testimony establishing causal connection between the explosion and alleged injury with reasonable medical certainty.
>
> (6) Laches.

STATEMENT OF CASE.

Petitioner's statement is inaccurate; it refers not once to the Record, to which some reference is requisite for a realization that there are other grounds on which a verdict could have been directed in addition to the validity of petitioner's release.

In June, 1961, a tank car exploded in Respondent's Toledo yards under circumstances of such clear liability, on its owner, lessee, and loader, that Respondent successfully sued all three for its damage and indemnity.

A box car was being switched upgrade toward a standing tank car. The box car was still moving with petitioner, a brakeman, walking behind it so as to set the brake after coupling, when the tank car exploded. He was not struck by anything, did not stumble or fall, just turned and ran (R. 75, 347).

Two days later, after working normally in the interim, he claimed he "blacked-out"; when he again claimed "black-out" a month later he was referred to Dr. Franklin Earnest, one of Toledo's leading neurologists, in no way connected with the railroad, not even to do periodic or back-to-work examinations as an independent contractor.

Dr. Earnest treated petitioner in Toledo Hospital from July 19 to July 29, 1961. X-rays taken July 20, 1961, as well as those taken up two days after the explosion when the first black-out was claimed, showed identical degenerative changes in the cervical spine:

> "* * * These findings may well have been due to old trauma, relation to present symptoms not clear.
>
> * * * * *
>
> "Discogenic disease—old injury * * *."

[Toledo Hospital records, plaintiff's Exhibit B (R. 309, 310)]. Dr. Earnest's diagnosis, "cervical radiculitis," is identical with the diagnosis of Dr. Marvin Green, who first

saw petitioner a year after the release was signed and who was the only medical witness on trial. Far from the hearsay, incorrect claim petitioner was told he was "fully recovered," assuming he did have any injury at all from this explosion, Dr. Earnest's final diagnosis on discharging plaintiff from Toledo Hospital, July 29, 1961, was:

> "*Some improvement with cervical traction. To continue at home.* (Signed) Earnest." (Italics added.) [Exhibit B, page 7.]

Petitioner had a contested divorce case pending throughout this period. His estranged wife was trying to locate and have him arrested for non-support, which she had previously done some "ten or twelve" times (R. 229). The most pertinent time she had him arrested was shortly after his release was signed, September 12, 1961 (R. 217).

This explains his repeatedly urging the Claim Agent to settle, "to see if we could get some money" (R. 89, 172). "He told me 'No'—because I wasn't back to work yet" (R. 145).

Since the Claim Agent refused to settle unless he was okayed for work, petitioner had Dr. Earnest examine him on September 8, 1961 (R. 90):

> "A. Yes, sir, I got okayed by the doctor to go back to work. * * *
>
> "A. Dr. Earnest in turn called Dr. Burkholder. I got to get an okay from Dr. Burkholder before I can go to work. He has to sign a paper stating that affect."

R. 108:

> "A. * * * He told me I could go back to work, and I thanked him and left.
>
> "Q. Did you agree with him?
>
> "A. Yes, sir, I told him I felt all right."

Four days later, September 12, 1961, Dr. Earnest reported to the Claim Agent that petitioner was not en-

tirely symptom-free, but had made sufficient progress so that he was anxious to return to work; and that he had advised him it might be necessary to continue with cervical traction. The Claim Agent therefore settled with him for $1,100.00 cash, plus paying Toledo Hospital and Dr. Earnest's bills, total $1,366.80. On December 1, 1964, that sum was tendered back plus six per cent interest, total $1,630.74.

Petitioner's release, Exhibit 4, was admitted without objection. He has three years of high school education and is a veteran of previous railroad claims and releases (R. 177, 178), with which he was thoroughly familiar (R. 185). He at first denied, then admitted, that he had previously hurt his neck and back (R. 86, 179).

Petitioner returned to work right after his settlement and worked steadily, continuously until July 13, 1962 (R. 93, Exhibit 6, R. 174-176). That night he was found unconscious on the floor of a caboose. His chief and first complaint was "hit from the back and robbed" (Hospital Records, Exhibit D, R. 309, 310). Later, after police investigation, he changed this version to "black-out —same as twice before." As to whether he was drunk and passed out for that reason, petitioner could not remember. He was not sure whether he had been drinking or not that day (R. 201, 202). It was only on his reiteration of "black-out" in this incident over a year after the explosion that the railroad's examining doctor in Detroit disqualified him for service. He was notified as to what steps to take toward reinstatement and though still on the Railroad's roster, has never taken step one requisite for reinstatement (R. 125). He made no claim whatsoever either for alleged injuries in the explosion of June 26, 1961, or any claim that he had executed a release through fraud or mutual mistake; nor did he make any claim after the

alleged black-out or slugging incident July 13, 1962. The first notice of any kind to the railroad, the first intimation of any claim, was in the filing of this suit June 12, 1964, two weeks before the three-year F.E.L.A. statute of limitations would have expired.

ARGUMENT.

No Mutual Mistake.

In order to avoid an admitted release, absent fraud, the mistake relied upon must be as to a past or existing fact; future developments are matters of opinion only, so that if a man has a recurrence of a known, existing condition, it cannot be the basis of relief from a release; 71 *A.L.R.* 2d 100.

The burden is on a plaintiff to prove such past or existing mistake by a preponderance of the evidence; *Callen v. Pennsylvania Rd. Co.*, 332 U.S. 625. Petitioner not only fails to do this, but admits to identical injury and says he is much better after signing the release.

R. 152:

> "Q. As you just testified that injury you had then, when you made the settlement in 1961, is the same that you had in 1962 when Dr. Green first examined you?
>
> "A. Yes, sir.
>
> "Q. It is the same now, isn't it? This pain in your neck?
>
> "A. *Not as much.*
>
> * * * * *
>
> "Q. *All these injuries you say you have now, you had then but they were worse then than they are now but all the same?*
>
> "A. *Yes, sir.*" (Italics added.)

But even if the alleged injury had worsened, there can be no Mutual Mistake as is requisite to avoid the release. *Kiloski v. Pennsylvania R. Co.*, 96 F. Supp. 321; syllabi 1 and 2:

> "1. A release of a claim for personal injuries cannot be avoided merely because the injuries prove more serious than the plaintiff at the time of executing the release believed them to be. Federal Employers' Liability Act, 45 U.S.C.A. Sec. 51 et seq.
>
> "2. In order to invalidate a release of a claim under the Federal Employers' Act, on account of mutual mistake, the mistake must relate to a past or present fact, material to the contract of release, and not to an opinion respecting future conditions as a result of present fact. Federal Employers' Liability Act, 45 U.S.C.A. Sec. 51 et seq."

To like effect, *Locke v. Atchison, Topeka and Santa Fe Ry. Co.*, 309 F. 2d 811, syllabus 1.

And in the recent Jones Act case, *Robles v. Trinidad Corporation*, 270 F. Supp. 570, syllabi 2 and 3 are apropos:

> "2. Mistake as to future unknowable effect of existing facts, mistake as to future uncertain duration of a known condition, or mistake as to future effect of a personal injury, is insufficient to set aside a release.
>
> "3. Evidence required conclusion that seaman who signed release was not overreached, that the release was fairly made and fully comprehended, that seaman knew the nature and meaning of the terms of the release, that each party entered into the settlement based upon identical information, and that there was no taint of fraud. Jones Act, 46 U.S.C.A. Sec. 688."

Even where the treating doctor tells a man he had "almost fully recovered" so he settled for $400.00, he was

not permitted to avoid his release, despite suffering a herniated disc thereafter; *Randolph v. Ottenstein,* 238 F. Supp. 1011, syllabi 5, 6. The Court's review of authorities, including F.E.L.A. cases and comments, p. 1013, are graphically applicable to our case.

There is nothing magical or sacrosanct about F.E.L.A. releases which takes them out of the realm of basic principles of contract. To hold otherwise, to permit voiding this release, with this set of facts, is to invite chaos and make a mockery of our law.

Virtually all the cases cited by petitioner involve either fraud, expressly waived by him (R. 139), or such flagrant mutual mistake as is tantamount to fraud. Each case necessarily turns on its own facts, as must ours. So regarded, none of the authorities relied on by petitioner may be invoked to gainsay the finding of all the Ohio courts which, applying Federal law, have found the evidence insufficient for submission to a jury.

Petitioner relies heavily on two cases: *Mangrum v. Union Pacific Rd. Co.,* 230 Cal. App. 2d 960, 16 A. L. R. 3d 543 and *Central of Georgia Railway Co. v. Ramsey,* 275 Ala. 7, 151 S. 2d 725, 16 A. L. R. 3d 623. Neither case is in point. In *Mangrum* a member of an operating crew got sick on duty and a company doctor, called to the train, diagnosed bronchitis, whereas the man died later of pneumonia; a clearer case of mutual mistake is difficult to imagine. The additional and crucial distinction between this case and ours is that when examined by the doctor in *Mangrum* the employee was engaged in an operational activity, primarily for the benefit of the railroad, and the doctor therefore acted in that respect as agent for the railroad. Syllabus 15:

> "* * * the doctor * * * (1) was engaged in an *operational* activity of the railroad, since a railroad

> cannot operate properly without a full healthy crew aboard the train, and (2) performed services resulting in financial benefit to the railroad, since the railroad was required by custom and practice to take care of its employees *who were sick while on duty.*" (Italics added.)

No such facts exist in our case. An employee who claims injury as Kaufman did, has no more right to medical treatment months later than he does to "wages." He must prove negligence before he can collect either. The indirect benefit of getting an injured employee to a good doctor, getting him well quickest and thus keeping to a minimum the cost of his claim, is secondary to the primary objective of the treatment, which is to effect a cure of the injured man. The Court in *Mangrum*, p. 559 of 16 A.L.R. 3d:

> "* * * It seems to be the general rule that an employer who undertakes gratuitously to furnish medical attention to his employees is liable only if he is negligent in the selection of the physician * * *."

The Court then proceeds to limit to two the situations where an independent contractor-physician performs a service for a railroad employee and is considered "agent" of the carrier under the F.E.L.A.:

First, as in *Sinkler v. Missouri Pacific R. Co.*, 356 U.S. 326, where the service constitutes a non-delegable "operational activity" of the railroad, one necessary to carry out its franchise; and second, as in *McGuigan v. Southern Pacific Co.*, 129 Cal. App. 2d 482, 277 P. 2d 444, where the railroad derived direct financial benefit from the operation of the hospital, supported it, had representatives on its board, etc., p. 560 (16 A.L.R. 3d):

> "* * * Testing Dr. Feeny's relationship to defendant under that theory it appears as a matter of law

> that a financial benefit accrued to defendant from his services, *as defendant was required by custom and practice to take care of its employee who was sick while on duty.* * * *" (Italics added.)

The *Ramsey* case is one of such flagrant mutual mistake as to amount almost to fraud.

Ramsey was told he had a sprain only, settled a few days after the accident for $69.00, whereas it developed he had a very badly fractured foot and was later in and out of the hospital owned and operated by the railroad no less than seventeen times.

Petitioner ignores the fundamental difference between medical services to a railroad crew member who gets sick on duty or in the course of a non-delegable operational activity, and treatment not of an emergency nature, not for sickness on duty, but solely to effect cure of injuries after an accident. Without proof of negligence, there is not only no right to collect wages lost due to injury, there is also no right to medical treatment therefor.

When petitioner claimed his second "black-out" a month after the explosion, the company examiner, one Dr. Burkholder, recommended he go to a leading neurologist, Dr. Franklin Earnest, a specialist in no way connected with the Railroad. Petitioner was free to refuse, free to choose any other doctor. Having accepted Dr. Earnest as his treating physician, the usual, confidential physician-patient relationship arose. Dr. Earnest was prohibited from furnishing reports or information of any kind to the Railroad without petitioner's consent. This had to be and was obtained. Otherwise there would have been a violation of medical ethics as well as the Ohio statutes. *Principles of Medical Ethics,* Chapter 2, Paragraph 1; Ohio Revised Code Section 2317.02 (a); Ohio Revised Code Section 4731.22. If Dr. Earnest had unauthorizedly di-

vulged information about petitioner to the Railroad Claim Agent, both the doctor and Claim Agent would have been answerable in damages.

Hammonds v. Aetna Casualty & Surety Co., 243 F. Supp. 793, syllabi 7 and 15:

> "7. Patient is entitled to legal recourse against doctor's breach of duties of secrecy or undivided loyalty."
>
> "15. One who induces doctor to divulge confidential information in violation of doctor's legal responsibility to patient may be held liable in damages to patient under Ohio law."

Two Ohio Supreme Court decisions clearly illustrate the distinction which must be drawn between medical services furnished primarily to heal injuries and those required of the railroad in the course of an operational, non-delegable activity, where a man gets sick on the job as occurred in the *Mangrum* case, or where a company doctor makes a compulsory "back-to-work" or a periodic examination; *Youngstown Park & Falls Street Ry. Co. v. Kessler*, 84 O.S. 74; *The New York Central Rd. Co. v. Wiler*, 124 O.S. 118.

In the *Kessler* case, the carrier "sent" its surgeon to treat an injured passenger, and although it paid for such services it was nevertheless held not liable as principal, its only duty being one of care in the selection of the physician.

In *Wiler*, the Supreme Court reiterates the rule in *Kessler* and draws the clear-cut distinction between treatment and a compulsory "back-to-work" examination, or an examination of a working member of a crew, as in the *Mangrum* case, *supra*. The Court, p. 123 of 124 O.S.:

> "* * * its purpose in selecting the physician was not to treat and cure this employe, but to furnish

it information which it required in the furtherance of its own purpose. * * *"

And so far as "benefit" to the railroad is concerned, what the Court says, p. 122, is applicable to all F.E.L.A. cases:

> "The purpose of the treatment in that case was to effect a cure of Kessler's injury. It was directly *for the benefit of Kessler, and, if for the benefit of the company at all, only indirectly so, in mitigation of the damage it might be required to pay for causing the injury.* This court held that such situation created the relationship of physician and patient between Kessler and the company's physician, *and the fact that the company assumed the obligation to compensate the physician* for such service did not alter that relation." (Italics added.)

No Railroad Negligence.

This is only one of several additional grounds for directing a verdict. We feel they should be called to the Court's attention to show how completely petitioner failed to present any fact issue. *Langnes v. Green,* 282 U.S. 531, 535, 539; *Walling v. General Industries Co.,* 330 U.S. 545, syllabus 3; 547, N. 5.

The amended complaint contains only two allegations of negligence:

> (1) no inspection;
>
> (2) negligently switching a box car "into and against said standing tank car at a speed in excess of 4 m.p.h."

(1) Requisite inspection was indisputably proved (R. 264, 266, 267):

> "Yes, it was made."

Exhibit 7, written report of the requisite inspection made by Conductor Grubba, was subpoenaed by plaintiff and admitted in evidence (R. 333).

(2) On excess speed on *impact,* petitioner not only failed to prove an impact at a speed in excess of four miles per hour, but some of his evidence tends to prove there was no impact whatsoever. Conductor McGraw (R. 281, 295):

> "I am not even sure whether it coupled.
> "I couldn't say that it did."

Petitioner's own testimony is even stronger. He says the box car was going slow enough so that he could keep up with it, he was not concerned with its speed at all, and could not say whether there was any impact at all before the explosion (R. 161, 162):

> "Your guess is as good as mine, brother.
>
> * * * * *
>
> "*It still is.*" (Italics added.)

This failure to prove either of the two claims of railroad negligence makes a non sequitur of the Court's Conclusion of Law No. 1:

> "1. There are debatable issues of fact as to the speed of the railroad car upon which reasonable minds could differ, normally requiring this issue to be submitted to the jury."

With petitioner's own evidence negating impact of any kind, prior speed of the box car is irrelevant; but even as to prior speed, petitioner's evidence establishes nothing but a normal, usual move.

The F.E.L.A. is neither insurance nor Workmen's Compensation with a jury empaneled to assess damages,

though some seem to think so. As Justice Douglas said in *Wilkerson v. McCarthy, et al.*, 335 U.S., at pp. 68, 69:

> "* * * the Act did not make the employer an insurer. * * *
>
> "The basis of liability under the Act is and remains negligence."

In *Ekenrode v. Pennsylvania Rd. Co.*, 164 F. 2d, the late J. Herbert F. Goodrich said, at p. 1000:

> "It is our responsibility to apply the negligence test honestly and not to pretend that there is negligence when it does not exist."

Judgment for the railroad was affirmed, 335 U.S. 329.

Two more and comparatively recent decisions by this Court which explode the myth that F.E.L.A. automatically guarantees jury consideration are:

Herdman v. Pennsylvania R. Co., 352 U.S. 518, refusing to apply res ipsa loquitur to F.E.L.A. and affirming a directed verdict, p. 520:

> "* * * We agree with the lower courts that a jury question of negligence was not presented by the proofs."

In *New York, New Haven & Hartford Rd. Co. v. Henagan*, 364 U.S. 441, this Court directed the District Court to enter judgment for the railroad notwithstanding a verdict for plaintiff. The basis: Insufficient proof to submit to the jury the question of employer negligence.

No Proximate Causal Relation Proved Between the Explosion and the Claimed Injury.

Dr. Marvin Green, the sole medical witness, first saw petitioner over a year after the explosion and failed to establish any proximate relationship between the explo-

sion and his findings with requisite medical certainty. He testified a patient (R. 358,359):

> "* * * in the vicinity of the explosion certainly could have injuries of this type.
>
> "What I saw *could* definitely result from being in the proximity of an explosion. That is my opinion, *and they could happen from other things.*" (Italics added.)

He testified drinking was one of many causes of "black-out" (R. 395, 398). He was asked to agree or disagree with the results of research reported in "A Clinical Neurologist" by Dr. Bernard J. Alpers, that 690 of 1167 cases, or 59.1%, of "black-outs" came from alcohol. His answer (R. 402):

> "I cannot answer yes or no. I want to read the whole book before I can answer."

The record is replete with evidence of petitioner's drinking, both before and after the explosion. The judge in his then pending divorce case issued an injunction against him coming into the house where his children were when he was intoxicated (R. 225). He had been arrested and jailed for drunken driving (R. 216), and in denying a charge of adultery, admitted that he "probably was" so drunk that he did not remember (R. 223, 224).

The law requires medical testimony causally connecting facts with injury, with reasonable medical certainty; *Marra Co. v. Norton,* 56 F. 2d 246; *Stacey v. Steel Corp.,* 156 O.S. 205. Even a so-called probability which is, as with Dr. Green's testimony, actually only conjecture based on the woefully incomplete history given him by petitioner, is not sufficient to meet the burden of proof required to establish causal connection. *Brecount v. Procter & Gamble Co.,* 166 O.S. 477, Syllabus 3; *Teti v. Firestone,* 392 F. 2d 294, syllabus 3. Plaintiff's evidence on all counts

is sadly lacking. The Supreme Court of Ohio has twice stated:

> "Under our law it is just as pernicious to submit a case to a jury and permit the jury to speculate with the rights of citizens when no question for a jury is involved as to deny to a citizen his trial by jury when he has the right."

Peters v. Transfer Co., 7 O.S. 2d 143, syllabus 8; *J. C. Penney Co., Inc. v. Robison*, 128 O.S. 626, Syllabus 6.

Laches.

After this release was signed, September 12, 1961, petitioner worked uninterruptedly for a year. On the night of July 13, 1962, he had another "accident" in which he first claimed he was slugged and robbed, then changed this version to "black-out" similar to the previous ones. Although he was then taken out of service, he made no claim whatsoever against the Railroad, no claim that his release had been obtained through fraud or mutual mistake. His first notice to the Railroad was in the filing of this suit two weeks before the statutory period of limitations would have elapsed. With the intervening injury, with no notice, and therefore opportunity to investigate, and assuming he did have a legitimate claim in the first place, prejudice to the Railroad by this delay is manifest. There is no hard and fast rule as to what lapse of time will amount to laches. Every case must be judged on its own facts; *Graham v. Atchison, Topeka & Santa Fe Rd.*, 176 F. 2d 819, syllabus 14; *Patterson v. Hewitt*, 195 U.S. 309, finding Laches notwithstanding the time fixed by the statute has not expired; *Alexander v. Phillips Petroleum Co.*, 130 F. 2d 593, syllabi 16, 31, p. 605; *Young v. Bradley*, 142 F. 2d 658, syllabus 12.

CONCLUSION.

To grant certiorari in this case, to review the evidence, would be to ignore this Court's own strictures to the Bar. *Houston Oil Co. v. Goodrich,* 245 U.S. 440; *Southern Power Co. v. North Carolina Public Service Co.,* 263 U.S. 508; *U. S. v. Johnston,* 268 U.S. 220, 227; *General Talking Pictures Corp. v. Western Electric Co.,* 304 U.S. 175, 178; dissent of Frankfurter, *J., Ferguson v. Moore-McCormack Lines,* 352 U.S. 524, at p. 537.

This case presents no constitutional question, no principle, no rule of law which has not been many times reviewed and adjudicated by this Court. It meets even that most stringent standard for directing a verdict, as stated by Justice Black in his dissent in *Galloway v. United States,* 319 U.S. at p. 407. Nor does the case present any matter of great interest or concern except to one litigant, dissatisfied with his settlement.

Under our Bill of Rights everyone has the right to his Day in Court. Petitioner, however, has already had his Day, in three Courts; and eleven Judges, one Trial, three Appellate and seven Supreme Court Judges in Ohio, have unanimously held his evidence insufficient for submission to a jury.

In *Basham v. Pennsylvania R. Co.,* 372 U.S. 699, another run-of-the-mill F.E.L.A. case, Justice Harlan said, p. 701:

> "To bring such a case here for further review by nine more Justices seems to me a most futile expenditure of judicial time. * * * I conclude that the only premise on which this reversal can be justified is that anything a jury says goes."

As the famous writer, Catherine Drinker Bowen, said (Speech to the Brandeis Lawyers Society, "The Lawyer

and the King's English") in quoting some of Justice Holmes' eloquent phrases: "Could it be better said?"

Respectfully submitted,

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